

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

DAVID PHELPS and MAX LUGAUER III, )  
Individually and On Behalf of All )  
Others Similarly Situated, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
3PD, INC., )  
 )  
Defendant. )

No. CV-08-387-HU

**FINAL ORDER APPROVING  
CLASS ACTION SETTLEMENT,  
AND AWARDING ATTORNEYS'  
FEES, EXPENSES, AND  
INCENTIVE AWARDS**

Mark A. Friel  
Steve D. Larson  
David F. Rees  
Jennifer S. Wagner  
STOLL STOLL BERNE LOKTING & SCHLACHTER P.C.  
209 SW Oak Street, Fifth Floor  
Portland, OR 97204

Miranda P. Kolbe  
Robert C. Schubert  
SCHUBERT & REED LLP  
Three Embarcadero Center, Suite 1650  
San Francisco, CA 94111

Attorneys for Plaintiffs

John A. Anderson  
ANDERSON & YAMADA, P.C.  
1515 SW Fifth Avenue, Suite 1020  
Portland, OR 97201

Robert L. Browning  
James Harold Hanson  
Craig J. Helmreich  
David D. Robinson  
Adam Smedstad  
R. Jay Taylor, Jr.  
SCOPELITIS, GARVIN, LIGHT, HANSON & FEARY, P.C.  
10 West Market Street, suite 1500  
Indianapolis, IN 46204

Attorneys for Defendant

1 - Final Order Approving Class Action Settlement

1 HUBEL, Magistrate Judge:

2 The plaintiffs in this case are former delivery drivers for  
3 the defendant who were classified as independent contractors during  
4 their tenure. The plaintiffs bring this action on behalf of  
5 themselves and other similarly-situated delivery drivers who  
6 provided home delivery services for the defendant in the State of  
7 Oregon during the time period from March 26, 2002, through the  
8 present. They assert claims under Oregon Revised Statutes sections  
9 652.610 (illegal deductions from ongoing wages) and 652.140  
10 (failure to pay wages due upon termination), as well as for unjust  
11 enrichment/restitution, rescission, injunctive and declaratory  
12 relief, and fraud.

13 On September 30, 2009, the court granted the plaintiffs'  
14 motion to certify the following class:

15 All individuals who (1) entered into a contract  
16 with [the defendant] to perform home delivery  
17 services either on his or her own behalf or on  
18 behalf of an entity, and (2) performed such home  
delivery services for [the defendant] in the state  
of Oregon during the period March 26, 2002 through  
the present.

19 Dkt. #102; see also Dkt. #111, clarifying the certification order.

20 Timely class notices were disseminated by First Class Mail to  
21 the class members, with the final deadline for exclusions set as  
22 May 4, 2010. Four individuals excluded themselves from the class.

23 The parties conducted significant investigation of the facts  
24 and law during the prosecution of this case including, *inter alia*,  
25 the exchange and analysis of information pursuant to formal and  
26 informal discovery requests, meetings and conferences, interviews  
27 of potential witnesses, and depositions. The parties' counsel  
28 further investigated the applicable law as applied to the facts

1 discovered regarding the plaintiffs' claims, possible defenses  
2 thereto, and the damages claimed by the plaintiffs. The parties  
3 participated in a mediation on January 20, 2010, and after further  
4 negotiations subsequent to the mediation, they ultimately reached  
5 agreement on terms of settlement, as memorialized in a Stipulation  
6 and Settlement Agreement of Class Action Claims, Dkt. #151 (the  
7 "Settlement Agreement").

8 The plaintiffs recognize the expense and length of continued  
9 proceedings that would be necessary to continue this litigation  
10 through trial and any possible appeals. They also have taken into  
11 account the uncertainty and risk of the outcome of further  
12 litigation, and the difficulties and delays inherent in such  
13 litigation. The plaintiffs also are aware of the burdens of proof  
14 necessary to establish liability for the claims they have asserted  
15 in the case, the defendant's defenses thereto, and the difficulties  
16 in establishing damages for themselves and the certified class.  
17 Based on these factors, as well as the settlement negotiations  
18 conducted by the parties, the plaintiffs have determined that the  
19 settlement is fair, adequate, and reasonable, and is in the best  
20 interests of all class members.

21 The plaintiffs have claimed, and continue to maintain, that  
22 their claims in this case have merit and give rise to liability on  
23 the part of the defendant. Neither the Settlement Agreement, nor  
24 any documents referred to therein, nor any action taken to carry  
25 out the Settlement Agreement, is, or may be construed to be, or may  
26 be used as an admission by or against the plaintiffs or class  
27 counsel as to the merits or lack thereof of the claims asserted in  
28 the case.

1       The defendant contends that all of the class members were  
2 properly categorized as independent contractors, they have been  
3 compensated in compliance with the law, and the defendant's conduct  
4 was not willful or improper with respect to any alleged failure to  
5 pay any compensation to the plaintiffs (including, but not limited  
6 to, final compensation, overtime, or otherwise). The defendant has  
7 denied and continues to deny each of the plaintiffs' claims and  
8 contentions in the case. The defendant denies any wrongdoing or  
9 legal liability arising out of any of the facts or conduct alleged  
10 in this case, and believes it has valid defenses to the claims  
11 asserted in the case. Neither the Settlement Agreement, nor any  
12 document referred to or contemplated therein, nor any action taken  
13 to carry out the Settlement agreement, is, or may be construed to  
14 be, or may be used as an admission, concession, or indication by or  
15 against the defendant of any fault, wrongdoing, or liability  
16 whatsoever.

17       Based on the court's review and consideration of documents  
18 filed by the parties and oral presentations made by counsel, the  
19 court entered, on October 27, 2010, an Order Preliminarily  
20 Approving Class Action Settlement and Approving Form and Method of  
21 Class Notice (the "Preliminary Approval Order"), Dkt. #163, which  
22 granted preliminary approval to the Settlement Agreement. The  
23 Preliminary Approval Order also approved the form of Notice and the  
24 Notice plan. In compliance with the Preliminary Approval Order,  
25 timely Notice of the proposed settlement was sent to all class  
26 members via First Class Mail. A deadline of March 18, 2011, was  
27 set for the filing of objections to the proposed settlement (i.e.,  
28

1 45 days after the mailing of the last of the Notices to class  
2 members). No objections have been filed.

3 This matter is now before the court on the Plaintiffs'  
4 Unopposed Motion for Final Approval of Class Action Settlement and  
5 Award of Attorneys' Fees, Expenses and Incentive Awards. Dkt.  
6 #168. The motion is supported by a Memorandum of Points and  
7 Authorities, Dkt. #169, and three supporting Declarations, Dkt.  
8 ##170, 171, and 172; a Stipulation and Settlement Agreement of  
9 Class Action Claims, Dkt. #151, with a corrected Exhibit 3 to the  
10 Stipulation and Settlement Agreement, Dkt. #153; Plaintiffs'  
11 Supplemental Brief Regarding Incentive Awards to the Class  
12 Representatives, Dkt. #157, and two supporting Declarations, Dkt.  
13 ##158 and 159; the court's Order Preliminarily Approving Class  
14 Action Settlement and Approving Form and Method of Class Notice,  
15 Dkt. #163; a Supplemental Memorandum, Dkt. #174; and a Supplemental  
16 Declaration of Max Lugauer III, Dkt. #178. The plaintiffs also  
17 have submitted for the court's consideration a proposed Order  
18 Granting Final Approval of Class Action Settlement, and Awarding  
19 Attorneys' Fees and Expenses and Incentive Awards, Dkt. #173.

20 The court has considered the motion and all supporting docu-  
21 ments submitted by the plaintiffs; counsels' oral presentations at  
22 a hearing held on May 10, 2011; and counsel's proposed language for  
23 this final order. Based on the foregoing, IT IS HEREBY ORDERED as  
24 follows:

25  
26 ***Jurisdiction***

27 This court has jurisdiction over the claims of the class  
28 members asserted in this proceeding and over all parties to the

1 action. Jurisdiction is predicated upon 28 U.S.C. § 1332, in that  
2 this is a civil action between citizens of different states, and  
3 the matter in controversy exceeds the sum of \$75,000 and the class  
4 members' claims collectively exceed the sum of \$5,000,000,  
5 exclusive of interest and costs. Venue is proper in the District  
6 of Oregon.

7  
8 ***Compliance with Federal Rules of Civil Procedure***

9 From consideration of all of the briefing, declarations, and  
10 argument in this case, including without limitation those related  
11 to the court's entry of the Preliminary Approval Order, the court  
12 finds that the applicable requirements of Federal Rule of Civil  
13 Procedure 23 have been satisfied with respect to the class and the  
14 proposed settlement.

15  
16 ***Notice to Class Members***

17 The Notice given to the class members fully and accurately  
18 informed them of all material elements of the proposed Settlement  
19 Agreement, and of their opportunity to object thereto; was the best  
20 Notice practicable under the circumstances; was valid, due, and  
21 sufficient notice to all class members; and complied fully with the  
22 laws of the State of Oregon, the Federal Rules of Civil Procedure,  
23 the United States Constitution, due process, and other applicable  
24 law. A full opportunity has been afforded to the class members to  
25 participate in the hearing on the plaintiffs' motion for final  
26 approval of the settlement, and no class members appeared for the  
27 hearing. Accordingly, the court finds and determines that all  
28 class members who did not submit a Request for Exclusion to Rust

1 Consulting, Inc. prior to May 4, 2010, are bound by this Final  
2 Order. In addition, a full opportunity has been afforded to all  
3 class members to object to the terms of the Settlement Agreement.  
4 Following Notice, no class members lodged objections.

5  
6 ***Final Approval of Settlement Agreement***

7 The court has reviewed the Settlement Agreement and finds that  
8 the Settlement Agreement was the product of intensive, serious,  
9 informed, non-collusive, arm's-length negotiations; has no obvious  
10 deficiencies; and does not grant improper preferential treatment to  
11 any individuals. The settlement is fair, reasonable, and adequate,  
12 and the plaintiffs have satisfied the standards for final approval  
13 of a class action settlement under federal law. In addition, the  
14 settlement is fair, adequate, and reasonable when balanced against  
15 the possible outcome of further litigation relating to the alleged  
16 misclassification of the class members, liability, and damages.  
17 Extensive investigation, discovery, and research have been  
18 conducted such that counsel for all parties have been able to  
19 evaluate their respective positions reasonably.

20 Pursuant to Federal Rule of Civil Procedure 23(e), the court  
21 hereby grants final approval to the Settlement Agreement and finds  
22 it to be fair, reasonable, adequate, and in the best interests of  
23 the class. Accordingly, the court hereby directs that the  
24 settlement be effected in accordance with the Settlement Agreement  
25 and the terms and conditions set forth below.

***Release of All Claims***

With this final approval of the proposed Settlement Agreement, it is hereby ordered that any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses (including attorney fees and costs), known or unknown, at law or in equity, which the class members (except the four individuals who excluded themselves from the class) may now have against the Released Parties, as defined in the Settlement Agreement, arising out of or in any way connected with the plaintiffs' provision or performance of services in the State of Oregon for the defendant prior to the date of the Settlement Agreement, and including without limitation (a) any facts, transactions, events, policies, occurrences, acts, disclosures, statements, omissions or failures to act, which are or could be the basis of claims that the defendant improperly classified the class members as independent contractors; (b) any and all claims for Oregon wage and hour law violations, illegal deductions from wages, unjust enrichment/quantum meruit, employee benefits, rescission and restitution, fraud, misrepresentation, injunctive relief, or penalties; and (c) any and all claims for violation of the Fair Labor Standards Act, as amended; the Employee Retirement Income Security Act, as amended; and any and all federal, state, and local statutes, ordinances, regulations, rules, and other laws, and any and all claims based on constitutional, statutory, common law, or regulatory grounds, as well as any other claims based on theories of wrongful or constructive discharge, breach of contract or implied contract, promissory estoppel, or damages under any other



1 federal, state, or local statutes, ordinances, regulations, rules,  
2 or laws, are hereby released. This release is for any and all  
3 relief, no matter how denominated, including without limitation  
4 back pay, front pay, employee benefits, restitution, vacation pay,  
5 bonuses, compensatory damages, tort damages, punitive damages,  
6 interest, penalties, attorney fees, and costs.

#### 7 8 ***Incentive Awards***

9 "Incentive awards are fairly typical in class action cases."  
10 *Rodriguez v. West Pub. Corp.*, 563 F.3d 948, 958 (9th Cir. 2009)  
11 (citations omitted). "Such awards are discretionary . . . and are  
12 intended to compensate class representatives for work done on  
13 behalf of the class, to make up for financial or reputational risk  
14 undertaken in bringing the action, and, sometimes, to recognize  
15 their willingness to act as a private attorney general." *Id.*, 563  
16 F.3d at 958-59.

17 The Ninth Circuit has expressed some concern about incentive  
18 awards, particularly those that are excessive in comparison to the  
19 recovery by individual class members. *See id.* (citing *Staton v.*  
20 *Boeing Co.*, 327 F.3d 938, 977-78 (9th Cir. 2003)). The court  
21 observed that individuals might be motivated to bring class  
22 actions, rather than individual actions, "principally to increase  
23 their own leverage to attain a remunerative settlement for them-  
24 selves and then trading on that leverage in the course of  
25 negotiations.'" *Id.*

26 In the present case, class counsel note that the class  
27 representatives participated actively throughout the litigation,  
28 and were instrumental in assisting counsel in understanding the

1 underlying factual details, and in producing documents. Plaintiff  
2 Phelps expended over 100 hours in furthering the litigation, while  
3 plaintiff Lugauer expended over 60 hours. In addition, plaintiff  
4 Lugauer lost approximately one month of employment due to necessary  
5 travel related to the taking of his deposition. The plaintiffs  
6 also faced some personal risk in acting as class representatives in  
7 the form of potential retaliation by a prospective employer who  
8 might see them as a risk to hire, and in the form of potential  
9 liability for expenses advanced by class counsel. See *Razilov v.*  
10 *Nationwide Mut. Ins. Co.*, No. 01-CV-1466-BR, 2006 WL 3312024, at \*3  
11 (D. Or. Nov. 13, 2006) (Brown, J.) (citing *Or. R. of Prof'l Conduct*  
12 *DR 5-103(B)*).

13 The court finds that payment of an incentive award to the  
14 named plaintiffs is warranted in light of the benefits they  
15 provided to the class and class counsel. The court further finds  
16 that an incentive award of \$15,000 to each named plaintiff would be  
17 excessive. The court orders payment of an incentive award in the  
18 amount of \$10,000 to plaintiff Phelps, and an incentive award in  
19 the amount of \$7,500 to plaintiff Lugauer, such payments to be made  
20 from the common fund.

21  
22 ***Award of Attorneys' Fees and Costs***

23 Attorneys' fees in this case will be payable from the common  
24 fund created upon payment of the settlement proceeds. In common-  
25 fund cases, "[t]he district court may exercise its discretion to  
26 choose between the lodestar and percentage method in calculating  
27 fees." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988,  
28 992 (9th Cir. 2010); see *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,

1 1029 (9th Cir. 1998) (same) (citing *In re Washington Public Power*  
2 *Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994)). In  
3 the Ninth Circuit, "a benchmark award for attorney fees" is "25% of  
4 the common fund." *Hanlon*, 150 F.3d at 1029 (citing *Six (6) Mexican*  
5 *Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.  
6 1990)). However, the district court may adjust the benchmark  
7 upward or downward in appropriate circumstances. See *Razilov*, 2006  
8 WL 3312024, at \*1 (citing *In re Pac. Enter. Sec. Litig.*, 47 F.3d  
9 373, 379 (9th Cir. 1995)). For example, courts generally agree  
10 that "the percentage of recovery fee should 'decrease as the size  
11 of the fund increases.'" *In re SmithKline Beckman Corp. Sec.*  
12 *Litig.*, 751 F. Suppl 525, 533 (E.D. Pa. 1990) (citations omitted).

13 The court in *In re Mercury Interactive Corp. Securities*  
14 *Litigation* provided guidance on the district court's role in  
15 reviewing an application for attorneys' fees in a class action  
16 case:

17 Because "the relationship between plaintiffs  
18 and their attorneys turns adversarial at the  
19 fee-setting stage, courts have stressed that  
20 when awarding attorneys' fees from a common  
21 fund, the district court must assume the role  
22 of fiduciary for the class plaintiffs." [*Class*  
23 *Plaintiffs v. City of Seattle (In re Wash.*  
*Pub. Power Supply Sys. Sec. Litig.)*, 19 F.3d  
1291, 1302 (9th Cir. 1994).] As a fiduciary  
for the class, the district court must "act  
with 'a jealous regard to the rights of those  
who are interested in the fund' in determining  
what a proper fee award is." *Id.*

24 *In re Mercury*, 618 F.3d at 994.

25 In *Razilov*, Judge Brown found an upward adjustment of 5% from  
26 the Ninth Circuit's 25% benchmark figure was warranted based on  
27 consideration of a number of factors, providing a well-reasoned  
28

1 approach to motions for attorneys' fees in these types of cases.  
2 Accordingly, I will consider the same factors here.

3  
4 **a. Settlement achieved**

5 From the common fund, each class member will receive, on  
6 average, approximately \$9,200. See Dkt. #174, p. 3. The court  
7 finds this amount to be fundamentally fair and a good result for  
8 the class members.

9  
10 **b. Risks of litigation/Contingent nature of the fee**

11 There are risks in any litigation, whether counsel represent  
12 an individual plaintiff or a class of plaintiffs. The risky nature  
13 of this particular litigation is underscored by recent defense  
14 verdicts in similar cases. See Dkt. #169, p. 12 (citing *Ruiz v.*  
15 *Affinity Logistics Corp.*, 697 F. Supp. 2d 1199 (S.D. Cal. 2010);  
16 and *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d 557  
17 (N.D. Ind. 2010)). However, counsel obviously believed the chances  
18 of recovery were good enough for them to accept representation of  
19 the plaintiffs on a contingency-fee basis.

20  
21 **c. Skill required and quality of work**

22 Counsel on both sides of this case did an excellent job of  
23 representing their clients, demonstrating high levels of skill and  
24 professionalism throughout.

1 ***d. Novelty and difficulty of the questions presented***

2 Although the legal issues in this case were not particularly  
3 difficult, gathering the facts and 'crunching the numbers' was  
4 laborious and time-intensive.

5  
6 ***e. Financial burden on class counsel***

7 The plaintiffs' counsel have not been paid during the course  
8 of this litigation. They represent that as of February 11, 2011,  
9 they had expended "over 3,625 hours" to prosecute the case. Dkt.  
10 #169, p. 19. They accepted the case on a contingent basis, and in  
11 that respect shared the plaintiffs' risk of non-recovery.

12  
13 ***f. Reaction of the class members***

14 No class member has filed an objection to the proposed  
15 settlement or the requested amount of attorneys' fees. No class  
16 member appeared at the hearing on the current motion for final  
17 approval of the settlement and award of attorney's fees, costs, and  
18 incentive awards.

19  
20 ***g. Customary fee***

21 As noted above, the Ninth Circuit has established a 25%  
22 benchmark for attorneys' fees in class actions, with appropriate  
23 departures for "'unusual circumstances.'" *Razilov*, 2006 WL  
24 3312024, at \*3 (quoting *Paul, Johnson, Alston, & Hunt v. Gaulty*,  
25 886 F.2d 268, 273 (9th Cir. 1989)). In cases that are not class  
26 actions, it is common for contingency-fee agreements to specify an  
27 average fee of one-third of the recovery. Here, class counsel are  
28

1 requesting a fee that represents 35% of the settlement proceeds.  
 2 Class counsel also seek reimbursement of expenses of \$68,964.38.

3 The court finds the requested expenses to be appropriate under  
 4 the circumstances of this case. The court further finds that an  
 5 upward adjustment from the Ninth Circuit's 25% benchmark to a fee  
 6 equal to 30% of the common fund is appropriate due to the result  
 7 achieved, the work expended, the quality of the lawyers' perfor-  
 8 mance, and the lack of any objections by the class members.  
 9 Therefore, the court grants the plaintiffs' motion for an award of  
 10 attorneys' fees and expenses in part, and awards class counsel  
 11 attorneys' fees in the amount of \$375,000, and expenses in the  
 12 amount of \$68,964.38, for all past and remaining work until the  
 13 completion of this matter. Such awards are fair and reasonable  
 14 under the circumstances.

15 The court further orders that the fees of Rust Consulting,  
 16 Inc. for administering the settlement be deducted from the common  
 17 fund prior to distributions to the class members.

### 18 *Scheduling Order*

19  
 20 The Court orders the following schedule of dates for further  
 21 proceedings:

|   |   |
|---|---|
| 22<br>23 Payment of Settlement Fund to<br>24 Settlement Administrator<br>25<br>26<br>27<br>28 | Within 5 days of the later of<br>the following: (1) thirty-three<br>days after service of Notice of<br>entry of this order on the<br>parties to the action and all<br>objectors to the Settlement<br>Agreement, if any, without any<br>appeals being taken; or (2) if<br>appeals or requests for review<br>have been taken, the date upon<br>which any orders affirming the |
|---|---|

Settlement Order or denying review after exhaustion of all appellate remedies have been entered (the "Effective Date"), Defendant will pay the entire \$1,125,000.00 Settlement Fund to the Settlement Administrator.

Payment of Attorneys' Fees and Expenses to Plaintiffs' Counsel, and Expenses to Settlement Administrator

Within 8 business days of the Effective Date.

Payment of Incentive Awards to Named Plaintiffs

Within 8 business days of the Effective Date.

Distribution of the remaining Settlement Funds to the Authorized Claimants

Within 30 calendar days of the Effective Date.

Distribution of any *cy pres* award

Within 210 calendar days of the Effective Date

Class Counsel files certification of completion of administration of Settlement Agreement

Within 240 days of Effective Date.

Following payment in full of all amounts awarded in this Final Order, and class counsels' filing of their certification of completion of administration of Settlement Agreement, the court will enter an order closing the case.

### ***Continuing Jurisdiction***

Without affecting the finality of this Final Order, the court reserves continuing and exclusive jurisdiction over the parties to the Settlement Agreement to administer, supervise, construe, and enforce the Settlement Agreement in accordance with its terms for the mutual benefit of the parties. Under Federal Rule of Civil Procedure 54, there being no just reason for delay, the court, in the interests of justice, expressly directs the Clerk of Court to

1 enter this Final Order, and hereby decrees that, upon entry, it be  
2 deemed final.

3 IT IS SO ORDERED.

4 Dated this 22nd day of June, 2011.

5  
6 /s/ Dennis James Hubel  
7 Dennis James Hubel  
8 Unites States Magistrate Judge  
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